Editor's note: Reconsideration granted; decision vacated -- See Louise Luke (On Reconsideration), 60 IBLA 399 (Dec. 28, 1981)

LOUISE LUKE

IBLA 75-433 Decided November 24, 1975

Appeal from decision of Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-8122.

Affirmed.

1. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments

   A Native allotment application is properly rejected where applicant fails to show occupation and use prior to the filing of a State selection application.

2. Alaska: Native Allotments

   Substantial use and occupancy, as contemplated by the Alaska Native Allotment Act, must be by the Native as an independent citizen for herself or as head of a family, and not as a minor child occupying or using the land in company with her parents.

APPEARANCES: Barbara Evans, Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Louise Luke appeals from a March 18, 1975, decision of the Fairbanks District Office, Bureau of Land Management, rejecting her Native allotment application F-8122 filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ The basis for the rejection was that appellant had

1/ The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), but applications pending in the Department at that time could be processed.

not shown that she used and occupied the land in her own right as an independent citizen prior to the filing on June 23, 1961, of a selection application by the State of Alaska.

According to the Native enrollment records, appellant was born on November 28, 1945. In her application for an allotment, the following information was listed as evidence of occupancy: Residence on the land from 1945 to 1951 "all year round"; gardening from 1945 to 1951; seven dogs kept on the land from 1945 to 1951; fishing, hunting, trapping, berrypicking, and wood cutting from 1945 to 1951. Appellant listed no improvements.

On April 24, 1974, the District Office notified appellant that additional evidence in support of her claim was necessary and gave her 30 days from receipt of the notice in which to send it. Another letter, dated October 3, 1974, extended the time allowed to 60 days from receipt of that letter. The postal return receipt card indicated that appellant received the second notice on October 7, 1974. Thus, the additional evidence was due on December 9, 1974. The District Office decision rejecting the application was issued on March 18, 1975, at which time no further evidence had been submitted. The lapse of time between the date of the first notice and the decision was almost 11 months.

Appellant's statement of reasons for appeal is accompanied by the separate statements of four witnesses, which are here filed for the first time. Appellant's counsel has submitted a statement to the effect that three of the witnesses live at Healy Lake, Alaska, which has no mail service, no telephone service, no road access, and no regular air service. It is said that the only access to Healy Lake is by snowmobile in the winter, or by charter aircraft. No explanation is given for the tardy submission of the statement of the fourth witness, who resides at Tanacross, Alaska.

The special procedures followed by the Alaska State Office in giving advance notice to Native allotment applicants of deficiencies and affording extended periods for the submission of further evidence before the application is rejected is predicated upon the Department's recognition of the fact that many such applicants and those with knowledge of their activities do reside in remote areas where problems of distance, climate, topography and access make it difficult to acquire and submit needed information within the time limits imposed on other classes of applicants, even in Alaska. Having thus made special provision to compensate for these factors at the Bureau level, we are not disposed to accept readily recitations of such difficulties to excuse a failure to submit additional evidence within the extended time afforded

by the Bureau for doing so. In the special circumstances of this case, however, we will consider the statements filed for the first time on appeal.

We note that the information supplied by the witnesses contradicts the information supplied in the allotment application, and the statements by the witnesses do not agree with each other. The witnesses' statements indicate that the applicant has used and occupied the land all her life, contrary to the statements in the application which only asserts that she "used" the land until she started school. Moreover, the application lists no improvements on the land, whereas the witnesses list numerous improvements. However, there is considerable disagreement between the witnesses as to what these improvements consist of.

As to whether or not the land was being used by anyone else beside the appellant, two witnesses state that her children were also using it. One witness indicates that no one else has used it for the last 20 years and another indicates that the land is being used by John P. Luke and Lee Saylor. The statements submitted by the witnesses cannot alter what was said in the application. The application stated the land was occupied or improved by someone other than herself but did not give any other information on that matter.

[1] The regulations provide that lands applied for by the State of Alaska will be segregated from all appropriations when the State files its application to select. 43 CFR 2627.4(b). A State selection will not extinguish valid existing rights, but appellant must demonstrate that she has such rights. Martha Isaac, 22 IBLA 224 (1975); Helen F. Smith, 15 IBLA 301 (1974).

[2] By the admission in her application, appellant used the land in question only from 1945 to 1951. These dates were clearly set forth in four separate sections of the application form. Since her birth date is November 28, 1945, she was only 6 years old in 1951 when she left the land to attend school. The Act does not require that the applicant be the head of a family or 21 years of age at the commencement of occupancy and use. However, substantial use and occupancy, as contemplated by the Act, must be by a Native as an independent citizen for herself or as the head of a household, and not as a minor child occupying or using the land in company with her parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); Natalia Wassilliey, 17 IBLA 348 (1974). In other words, she must be old enough to exert independent use and control over the land and must be occupying the land to the potential exclusion of all others. James S. Picnalook, Sr., 22 IBLA 191 (1975). The contention that a child from birth to age 6 could have exerted

independent use and control to the exclusion of others cannot be accepted. James S. Picnalook, Sr., supra. 2/ Appellant's failure to show that she used and occupied the land in her independent capacity prior to the 1961 State selection requires that her application be rejected. Helen F. Smith, supra; see Natalia Wassilliey, supra. Also, appellant's failure to use the land since 1951 prevents her from showing "substantially continuous use and occupancy of the land" as required by 43 U.S.C. § 270-3 (1970) and defined by 43 CFR 2561.0-5(a). Elsie Bergman, 22 IBLA 233, 235-236 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joan B. Thompson
Administrative Judge

2/ If appellant had shown that she had initiated her claim in an independent capacity prior to the filing of the State selection, her rights would have been preserved.